BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
FOREIGN-TRADE ZONES BOARD

In the Matter of:	)	
Foreign-Trade Zones 29 and 203, Applications for Subzone Authority, Dow Corning Corporation and REC Silicon	)	**Docket Nos. 20-2009 and 22-2009**

COMMENTS OF GLOBE METALLURGICAL INC.

I. Introduction

A. Globe Metallurgical's Interest in These Proceedings

In deciding whether to grant authority for a zone project, the Foreign-Trade Zones Board considers a number of factors, including the views of persons and firms likely to be affected by the proposed zone activity.[1] Globe Metallurgical Inc. ("Globe") is a company that would be seriously affected by the proposed zone activity in these cases.

Globe – which has production facilities in Alloy, West Virginia; Beverly, Ohio; Niagara Falls, New York; and Selma, Alabama – is the largest domestic producer of silicon metal.

Globe supplies silicon metal to both of the companies seeking subzone authority in these cases: Dow Corning Corporation ("Dow Corning")[2] and REC Silicon.[3] Silicon metal is one of the primary raw materials used to produce silicones at Dow Corning's Carrollton and Elizabethtown, Kentucky plants,[4] the proposed sites and manufacturing activity covered by the Dow Corning application. Silicon metal also is the most important raw material used to produce

[1] 15 C.F.R § 400.23(a).

[2] Subzone Application with Manufacturing Authority for Dow Corning Corporation, Foreign-Trade Zone #29 (February 12, 2009) ("Dow Corning Application") at 47; Transcript of Public Hearing, Dow Corning Corporation and REC Silicon Applications for Subzone Authority, Docket Nos. 20-2009 and 22-2009, at 53 (Mr. Sims), 70 (Mr. Perkins), 108 (Mr. Searcy) (September 1, 2009) ("Tr.").

[3] Foreign-Trade Subzone Application for REC Silicon Plants in Moses Lake, Washington (April 3, 2009) ("REC Silicon Application") at 4. Tr. at 41 (Mr. Bowes), 53 (Mr. Sims), 64 (Mr. Perkins).

[4] Dow Corning Application at 6.

polysilicon and silane gas at REC Silicon's Moses Lake, Washington plant, the site and manufacturing activity covered by the REC Silicon application.[5]

As discussed below, these applications make it clear that the core purpose of the proposed subzones is to allow Dow Corning and REC Silicon to purchase and consume silicon metal from China and Russia that is sold at unfairly low, dumped prices, without paying antidumping duties on such imports.

Globe was a petitioner in the antidumping proceedings in which the orders imposing these antidumping duties were issued.

As a domestic supplier of silicon metal to Dow Corning and REC Silicon and the largest member of the domestic industry meant to be protected by the antidumping relief now in place, Globe will be directly affected by the actions taken by the Board on these applications.

B. The Standards Applied in Deciding Whether To Authorize a Manufacturing Subzone

If a proposal to establish a zone project involves manufacturing activity or the creation of a subzone (both of which apply in this case), the Board evaluates whether the proposed zone activity is in the public interest.[6] Among the factors considered in deciding whether the proposed activity is in the public interest is whether the activity is consistent with U.S. trade and tariff law and policy.

Authorization to conduct manufacturing activity in a zone is a privilege, not a right.[7] Furthermore, "{i}n the case of subzones, the application burden is greater."[8] The burden is greater because

> {s}ubzones are single-user facilities, which are not structured to serve the public. It is their activity that has a public effect, and case law has recognized that the Board has broad authority to evaluate that effect in terms of the public interest.[9]

For these reasons, applicants for subzones have the burden of submitting evidence establishing that their proposed activity would result in a significant public benefit.[10]

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[5] *Id.* at 1; Tr. at 32 (Mr. Ostheimer).

[6] 15 C.F.R. §§ 400.23(b)(3), 400.31(a).

[7] *Foreign Trade Zones in the United States*, 56 Fed. Reg. 50,790, 50,793 (October 8, 1991).

[8] *Id.*

[9] *Id.* (citations omitted).

[10] 15 C.F.R. § 400.31(c)(3).

II. The Dow Corning and REC Silicon Applications Are Designed To Achieve an Improper Purpose That Is Contrary to the Public Interest and Inconsistent With U.S. Trade Law and Policy

A. The Objective of These Applications Is To Enable Dow Corning and REC Silicon To Consume Dumped Silicon Metal From China and Russia Without Paying Antidumping Duties

The central purpose of these applications is to gain access to unfairly low-priced imports of Chinese and Russian silicon metal without paying antidumping duties on those imports.

1. The Dow Corning Application

The Dow Corning application is very explicit in acknowledging this purpose. It states that Dow Corning's Kentucky operations are placed at a substantial cost disadvantage

> {d}ue to the U.S. government's determination that Chinese and Russian silicon metal is traded at less than fair market value and subsequent assessment of significant antidumping . . . duties.[11]

The application further states that FTZ designation will provide Dow Corning "critical benefits," the first of which is giving Dow Corning

> access to the same low-cost foreign silicon metal (subject to {antidumping} duties in the U.S.) to which many foreign producers have access.[12]

According to the application, if the subzone is approved, Dow Corning will import up to 60 percent of the silicon metal it consumes and as much as half of these imports will be subject to antidumping duties.[13]

In addition, listed among the "very important benefits" that FTZ status would provide is: "Duty avoidance (regular and {antidumping} duty) for silicones manufactured for export."[14] While the application also lists other benefits, it is clear from the zone savings estimates that the predominant anticipated benefit is the avoidance of antidumping duties. Specifically, the application estimates that "traditional" FTZ savings would be approximately $2 million annually, while the savings achieved by avoiding payment of antidumping duties would be about $5 to $10 million annually.[15]

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[11] Dow Corning Application at 9.

[12] *Id.* at 32.

[13] *Id.* at 46.

[14] *Id.* at 77.

[15] *Id.* at 77-78.

At the public hearing, a representative of Dow Corning testified that the company must have access to "silicon metal subject to antidumping duties under FTZ procedures" for export production so that it can purchase the same "low cost silicon metal" produced in China used by its foreign competitors.[16]

2. The REC Silicon Application

Like the Dow Corning application, the REC Silicon application states that approval of the proposed subzone would allow REC Silicon to become more cost competitive, "in that we can eliminate the payment of customs duties on our principal raw material (silicon metal)."[17]

As to the source of this silicon metal, the application states that:

> At the present time, REC Silicon has not purchased silicon metal from Russia or China. However, with the completion of our expansion of Plant 3 by the end of 2008 and expected completion of the construction of Plant 4 by the end of 2009, we anticipate a need to increase the amount of silicon metal we will require and are looking at all potential sources of supply.[18]

Furthermore, REC Silicon estimates in the application that it would realize zone savings of $1 to $2 million in 2009 and $2 to $3 million in 2010.[19] The application provides a breakdown showing that 99 percent of these savings would be achieved through duty elimination on exports – including the avoidance of antidumping and countervailing duties.[20]

At the public hearing, counsel for REC Silicon stated that REC Silicon wants to be able "to utilize in the future silicon metal subject to an antidumping duty [order] in the production of silane gas and polysilicon that it will export without REC Silicon being obligated to pay the antidumping duties" and requested "a grant of authority without any restriction" to make that possible.[21]

Thus, avoiding the payment of antidumping duties on imports used to produce exported merchandise is the central objective, not just one consequence, of these applications.

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[16] *Id.* at 14, 20 (Mr. Hansen). *See also* the reference to "Chinese producers or other third parties with access to Chinese silicon metal" during the rebuttal portion of the public hearing. Tr. at 110 (Mr. Searcy).

[17] REC Silicon Application at 3.

[18] *Id.* at 5.

[19] *Id.* at 10.

[20] *Id.* at 11.

[21] Tr. at 35 (Mr. Ostheimer).

B. Multiple Subzone Applications Have Now Been Submitted for This Same Improper Purpose

When the Board was reviewing the first application of this type – the application submitted by MPM Silicones LLC ("MPM") – Globe expressed concern that approving the application would lead to a series of applications of the same type from other major silicon metal consumers.[22] To date, three more such applications have been filed by silicon metal consumers, as well as a general purpose FTZ application that appears to be a precursor of a fifth such subzone application.

MPM filed the first application designed to obtain access to silicon metal imports without paying the antidumping duties that offset the unfairly low pricing of the imports.[23] The Board approved MPM's application with a number of restrictions.[24]

Hoku Materials, Inc. ("Hoku") filed the second application of the same type.[25] After Globe opposed the application and requested a hearing, Hoku amended the application to state that it would not bring any silicon metal that is subject to an antidumping or countervailing duty order into the subzone and agreed to a Board restriction prohibiting any silicon metal subject to an order from being admitted into the subzone. The Board then approved the subzone with a restriction "prohibiting any admission of silicon metal subject to antidumping or countervailing duty order."[26]

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[22] Rebuttal Comments of Globe Metallurgical Inc., Docket No. 4-2007, at 4 ("Granting MPM's application would invite similar applications from other large consumers of silicon metal") (November 5, 2007).

[23] *Foreign-Trade Zone 121 – Albany, New York, Application for Subzone, MPM Silicones, LLC (Silicone-Based Products and Intermediaries), Waterford, New York*, 72 Fed. Reg. 6,518 (February 12, 2007)

[24] *Grant of Authority for Subzone Status, MPM Silicones, LLC (Silicone-Based Products and Intermediaries), Waterford, New York*, 73 Fed. Reg. 19,191 (April 9, 2008). Specifically, the Board required that silicon metal subject to an antidumping or countervailing that is admitted into the MPM subzone ultimately be re-exported (regardless of whether it has been manufactured into a downstream product) and limited the amount of silicon metal subject to an antidumping or countervailing duty that could be admitted to the subzone to 10,000 metric tons per year. *Id.* In addition, the Board limited the approval of the subzone to an initial period of five years, subject to extension upon review. *Id.*

[25] *Foreign-Trade Zone 242, Boundary County, Idaho; Application for Subzone, Hoku Materials, Inc. (Polysilicon Manufacturing), Pocatello, Idaho*, 73 Fed. Reg. 59,597 (October 9, 2008).

[26] *Grant of Authority for Subzone Status, Hoku Materials, Inc. (Polysilicon Manufacturing), Pocatello, Idaho*, 74 Fed. Reg. 41,382 (August 17, 2009).

The Dow Corning and REC Silicon applications are the third and fourth subzone applications designed to avoid the payment of antidumping duties on inputs used to produce exported merchandise.

In addition to these four subzone applications, the Board recently approved an application from Butte-Silver Bow, Montana to establish a general-purpose FTZ. REC Silicon is the owner of a tract of land located in that FTZ[27] and submitted a letter concurring with the decision to apply for the zone.[28] In addition, the application identified REC Silicon as a company interested in FTZ benefits and as the largest manufacturer in Butte-Silver Bow.[29] REC Silicon produces polysilicon and silane gas at its plant on the site of the general purpose zone.[30] Thus, it appears likely that another subzone application will be filed to enable REC Silicon's Montana facility to consume dumped silicon metal without paying antidumping duties.

C. The Board Should Not Permit Subzones To Be Used To Undermine Antidumping Relief

1. Board Policy, Reflected in the FTZ Regulations, Prohibits the Use of Zones To Circumvent Antidumping Duty Orders

As explained above, avoiding the payment of antidumping duties on imports used to produce exported merchandise is the central purpose, not merely an incidental consequence, of these subzone applications. Authorizing subzones that have that central purpose would be contrary to the Board policy that zone procedures shall not be used to circumvent antidumping duty actions and to U.S. trade law and policy.[31] Specifically, in enacting the antidumping law, Congress sought to protect domestic industries (including their workers and the communities in which they live) from injury by unfairly traded imports.[32] Foreign-trade zones were never meant to be used as a device for escaping payment of antidumping duties and thereby undermining the relief from injurious dumping that antidumping orders are intended to provide.

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[27] *Proposed Foreign-Trade Zone, Butte-Silver Bow, Montana, Application and Hearing*, 73 Fed. Reg. 46,870 (August 12, 2008).

[28] Application to Establish, Operate, and Maintain a General-Purpose Foreign-Trade Zone in Butte, Montana, at Exhibit Four-E (May 13, 2008).

[29] Application for Alternative Site Framework for Foreign-Trade Zone No. 274, at 6, 12 (July 28, 2009).

[30] REC Silicon Application at 1 (footnote).

[31] 15 C. F. R.. §400.31(b)(1)(i), § 400.33(b)(1).

[32] In enacting the statute, Congress "was concerned not only for the welfare of the owners of producing plants, but also for the welfare of the employees in such plants and the communities of which they are a part." H.R. Rep No. 1, 67th Cong., 1st Sess. 23-24 (1921).

2. This Concern Is Heightened When Multiple Applicants Request Subzones To Evade the Same Order

When multiple U.S. consumers of a particular product apply for subzones for the purpose of avoiding payment of antidumping duties, the applications have a compounding effect on the domestic industry intended to be protected by the antidumping orders and on the integrity of the orders themselves. This compounding effect is particularly pronounced when the applicants are among the most important customers of the domestic industry, as is true here.

III. The Proposed Subzones Would Have a Very Serious Adverse Impact on the Domestic Silicon Metal Industry

A. The History of Injury To the Domestic Silicon Metal Industry Caused by Unfairly Traded Imports

Silicon metal is a globally traded commodity product that is sold on the basis of price.[33]

The U.S. silicon metal industry has twice been devastated by onslaughts of unfairly low-priced imports. The dumped imports were sold at low and declining prices that undercut domestic producer prices and caused U.S. market prices to collapse. The enormous price declines caused by the imports forced Globe and other U.S. silicon metal producers to lower their prices to compete with the prices of the unfairly traded imports or lose sales. As a result, U.S. silicon metal producers suffered declining sales revenues, lost sales, and significant operating losses.

During the second surged of dumped imports, Globe was forced to put itself up for sale in December 2002, file for Chapter 11 bankruptcy protection in April 2003, and shut down its Niagara Falls plant in September 2003.

Globe and other domestic producers filed unfair trade actions that resulted in findings by the Department of Commerce ("DOC") that the imports were sold at dumped prices[34]

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[33] Tr. at 46-47 (Mr. Sims).

[34] The imports were found to be dumped at very high margins of dumping. The current antidumping duty deposit rate on most silicon metal imports from China is 139.49 percent and the current deposit rates on imports from Russia are 61.61 and 87.08 percent. *Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Silicon Metal from the People's Republic of China*, 73 Fed. Reg. 46,587 (August 11, 2008); *Silicon Metal from Russia*, Inv. No. 731-TA-991 (Review), USITC Pub. 4018, at I-6 (June 2008). Two Chinese suppliers currently have lower deposit rates, which were established in new shipper reviews. Silicon metal produced and exported by Jiangxi Gangyuan Silicon Industry Co. Ltd. currently is subject to a duty deposit rate of 50.62 percent. Silicon metal produced by Datong Jinneng Industrial Silicon Co., Inc. and exported by its affiliate Shanghai Jinneng International Trade Co., Ltd. is subject to a deposit rate of 7.93 percent. *Silicon Metal from the People's Republic of China: Notice of Final Results of the 2005/2006 New Shipper Reviews*, 72 Fed. Reg. 58,641, 58,642 (October 16, 2007). These company-specific rates were challenged in appeals before the U.S. Court of

and by the U.S. International Trade Commission ("ITC") that the imports caused material injury to the U.S. silicon metal industry.

Antidumping orders were issued to provide relief from the injurious dumping that was occurring.

B. The Chinese and Russian Silicon Metal Industries

Currently there are two antidumping duty orders in place, covering imports from China and Russia. The orders provide critical protection for the domestic industry and its workers from renewed injury inflicted by the dumped imports.

Chinese silicon metal suppliers are the process of achieving world dominance by undercutting the prices of market-economy suppliers. China has aggressively undersold Western producers in silicon metal markets globally. Canada (where no antidumping relief is in place) was a U.S. export market. Now almost 100 percent of Canadian imports are from China.[35] The Canadian domestic producer sells its output mainly in the U.S. and in Europe, because it cannot compete with dumped Chinese silicon metal in its own country.[36]

China has by far the largest silicon metal production capacity in the world, by far the largest production volume, and an enormous amount of excess capacity.[37] In 2008, there were more than 220 Chinese silicon metal producers, with a total production capacity of approximately 1.9 million MT.[38] That year, the Chinese industry produced 960,000 MT of silicon metal, an amount equivalent to 53 percent of total global production and more than three times total U.S. consumption (302,200 MT).[39] The Chinese industry is heavily export-oriented. About 70 percent of its production is exported.[40] In 2008, China exported 672,500 MT of silicon metal.[41]

International Trade ("CIT") and, as a result, the DOC calculated greatly increased dumping margins of 71.47 percent for Shanghai Jinneng and 50.41 percent for Jiangxi Gangyuan. *Globe Metallurgical Inc. v. United States*, Consol. Court No. 07-00386, slip op. 09-37 (May 5, 2009). The CIT decision is currently on appeal before the U.S. Court of Appeals for the Federal Circuit.

[35] Tr. at 51-52 (Mr. Sims). Imports from China constituted 92.9, 98.2, 98.5, and 99.53 percent of total Canadian silicon metal imports during calendar years 2005, 2006, 2007, and 2008, respectively. *See* Canadian Import Statistics for Commodity 28469, Silicon Nes, *available at* http://www.gtis.com/gta/secure/htscty_wta.cfm (last visited April 22, 2009).

[36] Tr. at 52 (Mr. Sims).

[37] *Id.* at 51 (Mr. Sims).

[38] Tr. at 15 (Mr. Hansen).

[39] Tr. at 51 (Mr. Sims).

[40] *Id.*

[41] *Id.*

The Russian silicon metal industry also is heavily export-oriented. Russia is second only to China in using aggressive unfair pricing to penetrate foreign markets.[42]

Last year, the ITC found that revoking the antidumping order on imports from Russia would likely result in a recurrence of material injury to the U.S. silicon metal industry.[43] The Commission made the same finding with respect to imports from China two years earlier.[44]

In making its determination regarding imports from Russia, the ITC found it likely that the Russian import volume would be significant because of the Russian producers' large capacity, significant excess capacity, increased production, and export orientation.[45] The ITC also found it likely that the Russian producers would price aggressively in order to gain market share and would undersell the domestic industry, significantly depressing or suppressing prices for domestic silicon metal.[46] Finally, the ITC found it likely that the Russian imports would cause employment declines; have a significant adverse impact on the production, shipments, sales, and revenues of the domestic industry; cause the domestic industry to lose market share; and have a direct adverse impact on the industry's profitability and its ability to raise capital and make necessary capital investments.[47]

Similarly, in its determination regarding imports from China, the ITC found it likely that the volume of imports from China would be significant if the order were revoked because of China's large capacity, significant excess capacity, high and increasing level of production, and export orientation[48] and that the imports would cause employment declines for domestic firms and have a significant negative impact on the production, shipments, sales, and profitability of the domestic industry, as well as its ability to raise capital and make necessary capital investments.[49]

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[42] *Id.* at 52.

[43] *Silicon Metal from Russia*, Inv. No. 731-TA-991 (Review), USITC Pub. 4018 (June 2008).

[44] *Silicon Metal from Brazil and China*, Invs. Nos. 731-TA-471 and 472 (Second Review), USITC Pub. 3892 (December 2006).

[45] *Silicon Metal from Russia*, USITC Pub. 4018 at 12.

[46] *Id.* at 14.

[47] *Id.* at 15-16. The DOC found that revocation of the Russia order would likely lead to continuation or recurrence of dumping at margins ranging from 61.61 percent to 87.08 percent. *Silicon Metal From the Russian Federation: Final Results of Expedited Sunset Review of Antidumping Duty Order*, 73 Fed. Reg. 31,064 (May 30, 2008).

[48] *Silicon Metal from Brazil and China*, USITC Pub. 3892 at 23.

[49] *Id.* at 24-25. The DOC found that revocation of the China order would likely lead to continuation or recurrence of dumping at a margin 139.49 percent. *Silicon Metal from the People's Republic of China and Brazil; Final Results of the Expedited Review of the Antidumping Duty Orders*, 71 Fed. Reg. 26,334, 26,335 (May 4, 2006).

C. Globe's Silicon Metal Operations and the Critical Importance to Globe and Its Employees of Maintaining the Integrity of the Antidumping Orders

The relief provided by the orders has allowed Globe to emerge from bankruptcy, regain financial viability, and improve and expand its U.S. silicon metal production operations.

New owners brought the company out of bankruptcy in 2004 and invested in making the company an efficient, low-cost producer.

In December 2005, Globe acquired the Alloy, West Virginia plant from Elkem Metals Company, which was going to close the plant if it could not find someone to purchase the facility. The acquisition and the improvements Globe made to the Alloy plant required an investment of $145 million.[50]

In February 2008, Globe entered into an agreement for an innovative energy recycling project at the Alloy facility. The project will capture the heat from the silicon metal furnaces, convert the heat into steam, and use the steam to drive a power generator. The recycled energy will offset nearly one-third of the purchased electricity currently used in the plant's furnaces, generate over 300,000 megawatt hours of clean energy, and eliminate 290,000 MT of greenhouse gas emissions.

Last year, Globe committed $60 million to reopen and expand the Niagara Falls plant, which had been idled since it was shut down in 2003.

Globe is spending $20 million to refurbish two existing furnaces and install state-of-the-art pollution control equipment. The remaining $40 million are being invested in a new 100,000 square foot facility. Using proprietary technology that Globe developed, the new plant will refine metallurgical-grade silicon metal into high purity silicon metal for use in making solar cells.

Globe expects this investment to generate 500 new "green collar" jobs, with an average annual salary of $52,000. The Niagara Falls project has received significant support from state and local governments, as well as low-cost, economic development power from the New York Power Authority. The new and improved Globe facilities are expected to serve as a springboard for the development and growth of solar cell production and research in New York state.

Significant state and local government support also has been received for a similar Globe solar-grade silicon project in Beverly, Ohio.

None of the steps that Globe is taking would have been possible without the antidumping orders.

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[50] Tr. at 48-49 (Mr. Sims).

III. REC Silicon Has Failed To Establish That Its Proposed Subzone Would Result in a Significant Public Benefit

Under the Board's regulations, applicants are expected to submit probative and substantial evidence establishing the basis for their applications.[51] In addition, as stated above, because subzones are single-user facilities, applicants for subzones have the burden of submitting evidence establishing that their proposed activity would result in a significant public benefit.[52]

A. REC Silicon's Claims Regarding How the Proposed Subzone Would Produce a Significant Public Benefit

Consistent with this requirement, the Board's guidelines instruct applicants to explain in detail "why approval of a FTZ manufacturing subzone for your company would be beneficial overall to the United States."[53]

In response to this instruction, REC Silicon stated that (1) its proposed subzone would reduce its costs by eliminating the duties paid on imported silicon metal used to produce polysilicon[54] and (2) the resulting increased cost competitiveness would allow it "to continue to maintain and possibly expand" its operations in the United States[55] and "should" result in "increased employment (or at the very least, retained employment)" at its Moses Lake facility.[56] In addition, REC Silicon claimed that there is a silicon metal "availability shortage" and that subzone authority would assist it "in remaining profitable and more competitive" despite increasing silicon metal prices that "greatly impact the operating profits of all polysilicon producers."[57]

As explained below, these representations are unsupported and fall far short of establishing that the proposed subzone would generate a significant public benefit.

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[51] 15 C.F. R. § 400.31(c)(3).

[52] *Id.*

[53] U.S. Foreign-Trade Zones Board Guidelines: Application for Special-Purpose Subzone with FTZ Manufacturing Authority at ¶2, *available at* http://ia.ita.doc.gov/ftzpage/ftznew/sz-gdln.html (last visited October 15, 2009) (emphasis added).

[54] REC Silicon Application at 1.

[55] *Id.* at 4.

[56] *Id.* at 1-3. Specifically, REC Silicon stated that it is "hopeful" that increased cost competitiveness would result in "greater sales, which in turn, will necessitate the need for additional employees in Moses Lake." *Id.* at 2-3.

[57] *Id.* at 2.

B. The Claimed Unavailability of Silicon Metal

REC Silicon claims that only an extremely limited amount of domestic silicon metal is available to it.[58] Regarding Globe, REC Silicon claims that silicon metal is unavailable because Globe sells a large percentage of its production to Alcoa.[59] REC Silicon submitted no evidence to support these assertions. As explained at the hearing, they are completely untrue.

Globe does not sell a large percentage of its total production to Alcoa. To the contrary, through the end of August 2009, less than four percent of Globe's sales were to Alcoa.[60]

Furthermore, Globe currently supplies REC Silicon under a long-term contract, which calls for REC Silicon to purchase specified amounts of silicon metal in 2009 and 2010. This February – at the same time REC Silicon was preparing its application claiming there is a supply shortage – the company asked Globe to reduce or delay deliveries under the contract. One month later, and only two weeks before submitting its subzone application, REC Silicon declared force majeure under the contract and stated that it was unable to accept any more silicon metal deliveries until further notice.[61]

Moreover, since 2008 Globe has offered to enter into a new 10-year long-term supply agreement with REC Silicon. Globe's most recent offer of such an agreement was made this spring. Globe also offered to supply REC Silicon with an additional amount of silicon metal in 2010 under the current contract. REC Silicon both refused this offer and has been unwilling to discuss a new long-term supply agreement.[62]

REC Silicon's supply shortage claims also are contradicted by the fact that Globe has a very large amount of unused silicon metal production capacity – more than 75,000 MT per year of available capacity.[63]

Furthermore, silicon metal is readily available to REC Silicon from foreign suppliers in numerous countries that are not subject to antidumping duty orders. In the first half of 2008, before the economic downturn, the United States imported almost 87,000 MT of silicon metal from 14 countries other than China and Russia. The most recent silicon metal industry study published by CRU International ("CRU") shows that in 2009, nearly 341,000 MT of

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[58] REC Silicon Application at 2.

[59] *Id.*

[60] Tr. at 64 (Mr. Perkins).

[61] *Id.*

[62] *Id.* at 64-65.

[63] *Id.* at 65, 70.

unused capacity is available in countries that are not covered by antidumping orders – more than 43 percent of these countries' total production capacity.[64]

Moreover, the companies that REC Silicon's own application identifies as major foreign suppliers of silicon metal[65] have large amounts of unused capacity and are operating at very low capacity utilization rates. These suppliers include Norwegian silicon metal producer Elkem AS ("Elkem"),[66] the fourth largest silicon metal producer in the world.[67] Elkem is REC Silicon's largest shareholder (owning 23.45 percent of REC Silicon's shares as of December 31, 2008). On a combined basis, Elkem and its parent company, Orkla ASA, own 40 percent of REC Silicon.[68] REC Silicon has not explained why it cannot obtain silicon metal from its largest shareholder. According to CRU, Elkem has 43,000 MT of unused capacity and is operating at a 64.2 percent capacity utilization rate.[69]

Among the other major foreign suppliers identified, Ferroatlantica has 126,000 MT of unused capacity and is operating at a 48.4 percent capacity utilization rate.[70] RIMA has 38,000 MT of unused capacity and is operating at a 36.7 percent capacity utilization rate.[71]

These facts show that REC Silicon's claims regarding a silicon metal supply shortage are completely without basis.

C. The Claimed Escalation of Silicon Metal Market Prices

The REC Silicon application states that U.S. silicon metal prices have increased greatly over the past ten years. However, the application's discussion of silicon metal prices ends in 2008, when the spot price ranged from $1.40/lb. to $1.75/lb., averaging $1.58/lb. As a result, the application fails to reflect the large price decline that has occurred since prices peaked in April 2008. As REC Silicon acknowledged at the public hearing, during 2009 the silicon metal spot price published by Ryan's Notes – and cited by REC Silicon – declined by almost 43 percent to a low of $1.00/lb. The current Ryan's Notes spot price is $1.195/lb.

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[64] CRU International, Silicon Market and Industry Analysis at 35, 38(September 2009).

[65] REC Silicon Application at 5.

[66] *Id.*

[67] CRU International, Silicon Market and Industry Analysis at 37.

[68] Renewable Energy Corporation ASA, Annual Report 2008, at 27, *available at* http://hugin.info/136555/R/1307727/301168.pdf (last visited October 14, 2009).

[69] CRU International, Silicon Market and Industry Analysis at 37.

[70] *Id.*

[71] *Id.*

The REC Silicon application also does not acknowledge how insignificant the price of silicon metal is in relation to the price of polysilicon. The application states that the average U.S. silicon metal spot price increased from between $0.76/lb. and $0.79/lb. in 2004 through 2006, to $1.06/lb. in 2007, and ranged as high as $1.75/lb. in 2008. What it fails to mention is that the polysilicon spot price increased over the same period from between $32/kg ($14.52/lb.) and $175/kg ($79.38/lb.) in 2004 through 2006, to $200/kg ($90.72/lb.) in 2007, and ranged as high as $417/kg ($189.15/lb.) in 2008.[72] Thus, throughout the period, the price of polysilicon was radically higher than the price of the silicon metal used to produce polysilicon. For example, at the highest point in 2008, the polysilicon spot price was more than 108 times higher than the silicon metal.[73]

These facts demonstrate that REC Silicon is wrong in claiming that increasing silicon metal prices "greatly impact the operating profits of all polysilicon producers."

D. The Claimed Need for a Subzone for REC Silicon To Be Cost-Competitive

REC Silicon also claims that it needs a subzone to be more cost-competitive. As explained below, extensive evidence contradicts this unsupported claim.

1. REC Silicon's U.S. Investments

REC Silicon has made very large investments in its U.S. operations in recent years. Specifically, when REC Silicon started construction of its Plant 3 in Moses Lake, Washington in August 2006, the investment was estimated at $600 million. Less than a year later, in April 2007, REC Silicon announced its decision to invest an additional $485 million in a further expansion of its Moses Lake facilities. There is no indication that these investments were in any way dependent on obtaining subzone authority or getting access to dumped silicon metal without paying antidumping duties.

2. REC Silicon's Cost Competitiveness

A press release issued by REC Silicon's parent company, Renewable Energy Corporation ASA ("REC ASA"), in February 2008 states that REC Silicon is a "cost leader in

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[72] This information is based on price research available from Photon Consulting LLC.

[73] During the first half of 2009, the polysilicon spot price averaged $88/kg ($39.92/lb.), while the silicon metal spot price averaged $1.21/lb. Thus, during the first half of 2009, the average price of polysilicon was almost 33 times higher than the average price of the silicon metal used to produce polysilicon. Reflecting the very high value of polysilicon as compared to silicon metal, REC Silicon's application shows that all foreign and domestic materials (including silicon metal) account for only 10-20 percent of the value of the polysilicon that REC Silicon produces and that 80-90 percent of the value is value added by REC Silicon (including profit). REC Silicon Application at 4. For REC Silicon's other product, silane gas, all raw materials (including silicon metal) account for an even smaller portion (3-10 percent) of the value of the final product (including profit). *Id.*

the production of polysilicon for the solar industry" and that its fluidized bed reactor ("FBR") technology will allow it to maintain and fortify that position.[74]

REC Silicon is using this technology in the plant expansion at Moses Lake that started production in March of this year.[75] According to REC ASA's annual report, the "plant will be a significant contributor to cost reductions in 2009."[76] The technology "is expected to reduce energy consumption in the chemical vapor deposition by more than 80 percent compared to standard Siemens reactors."[77] In addition, "{l}ower energy consumption and other scale and operational benefits are expected to . . . reduce polysilicon production cost significantly compared to a traditional plant based on Siemens technology."[78] Finally, the FBR technology is an important part of the five-year cost road map that REC Group established in 2005 to reduce production costs by almost 50 percent in the company's "best plants" by 2010 (compared to world-class production costs in 2005).[79]

In sum, REC Silicon is already highly cost-competitive. Moreover, the expansion projects at Moses Lake (one of which already has started production) will further reduce the company's production costs significantly in the current year and for years to come.

3. REC Silicon's Extraordinary Profitability

REC Silicon estimates that its FTZ savings would be between $1 million and $2 million for 2009 and between $2 million and $3 million for 2010.[80] As discussed below, these anticipated savings represent a miniscule percentage of REC Silicon's annual revenues and earnings.

The financial performance data in REC ASA's second-quarter 2009 report show that REC Silicon is highly profitable. In the second quarter, REC Silicon reported revenues of more than $144 million and EBITDA[81] of $69 million, which is equivalent to a 48 percent

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[74] *REC ASA – Silicon Expansion Project – Delay and Cost Overrun, available at* http://www.recgroup.com/en/media/newsroom/?feed=R/136555/PR/200802/1188783.xml (last visited October 15, 2009).

[75] Renewable Energy Corporation ASA, Annual Report 2008, at 6, 10, *available at* http://hugin.info/136555/R/1307727/301168.pdf (last visited October 14, 2009).

[76] *Id.* at 6.

[77] *Id.*

[78] *Id.*

[79] *The REC Cost Roadmap, available at* http://www.recgroup.com/en/tech/costroadmap/ (last visited October 16, 2009).

[80] REC Silicon Application at 10.

[81] EBITDA (earnings before interest, taxes, depreciation and amortization) is a widely used measure of a company's financial performance.

margin.[82] This high level of profitability is not a temporary phenomenon. REC Silicon's EBITDA margins for the preceding four years were 41 percent (2005), 50 percent (2006), 54 percent (2007), and 51 percent (2008).

4. REC Silicon's Large Volume of Captive Sales to REC Wafer and Long-Term Take-or-Pay Contracts

REC ASA's second-quarter 2009 report states that all of REC Silicon's polysilicon production was shipped "according to the terms and conditions set out in the long-term contracts" and that "{t}he majority of the volume is allocated to REC Wafer."[83] REC Silicon and REC Wafer are both wholly-owned subsidiaries of REC Group.[84] Thus, the majority of the volume of REC Silicone's sales consists of captive sales to its own downstream affiliate.

Furthermore, in a March 2009 presentation at an investors conference, the CEO of REC Group explained that long-term customer relationships are the most important of the firm's three focus areas.[85] Consistent with this fact, the presentation showed that REC Silicon has a large long-term contract portfolio. Under these long-term contracts, deliveries valued at almost $415 million are scheduled for 2009, deliveries valued at more than $500 million are scheduled for 2010, and deliveries valued at more than $1.5 billion are scheduled for 2011-15.[86]

REC Silicon's expected long-term contract revenues in 2009 alone account for more than 70 percent of the company's annualized total revenues (based on its revenues through the first half of 2009). In a 2008 press release, REC Group announced a number of new long-

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[82] The source of these data is REC ASA's Second Quarter 2009 Report at 6, *available at* http://hugin.info/136555/R/1333785/316273.pdf (last visited October 13, 2009). The report shows revenues of NOK 929 million and EBITDA of NOK 442 million for the second quarter 2009. We used an exchange rate of 6.4321 NOK/US$ on June 30, 2009 to convert the amounts to U.S. dollars.

[83] *Id.* at 5.

[84] *See* REC Silicon website, REC's Company Structure, *available at* http://www.recsilicon.com/default.asp?V_ITEM_ID=487 (last visited October 13, 2009).

[85] 4th PV Investors Conference, Presentation of REC Group President and CEO Erik Thorsen, at 5 *available at* http://hugin.info/136555/R/1295096/293986.pdf (last visited October 13, 2009) ("PV Investors Conference Presentation").

[86] *Id.* at 6. In the presentation, the values are reported in NOK, based on currency exchange rates on December 31, 2008. Accordingly, we converted the values from NOK to U.S. dollars based on the exchange rate on December 31, 2008 (NOK 6.99/$). The same information regarding the long-term contract portfolio was also provided in an even more recent investors presentation. *See* Renewable Energy Corporation ASA, NEREC Investor Seminar 2009, October 8, 2009, at 9, *available at* http://hugin.info/136555/R/1346686/323555.pdf (last visited October 14, 2009) ("NEREC Investors Seminar Presentation").

term contracts, stating that "more than 90% of REC's polysilicon revenues through 2013 are already under contract through REC's own value chain and with external customers."[87]

The long-term contracts were signed "with leading industry players worldwide" at "{p}re-determined prices and volumes."[88] The contracts are secured by bank guarantees or pre-payments.[89] Furthermore, they are take-or-pay contracts, which means that the customer is obligated to pay for the contracted volume at the agreed price, regardless of whether the customer actually takes the merchandise. In its 2008 annual report (issued in April 2009), REC Group explained with respect to REC Silicon's and REC Wafer's long-term contracts that "the contract structures overall leave limited room for adjustments, and provide a reasonably robust outlook for sales in the near- and medium-term."[90]

The 2008 annual report also states that approximately 70 percent of the polysilicon volumes "were shipped to REC companies" and that during 2008, REC Silicon "{f}urther strengthened its dominant position in the commercial merchant market for silane gas."[91]

In sum, not only is REC Silicon currently highly profitable, but due to its predominantly captive customer base, its extensive long-term contracts portfolio, the favorable provisions of the long-term contracts, and its dominant position in one of its market segments, the company is all but guaranteed to continue to be highly profitable in the near- to mid-term future.

E. REC Silicon's Failure To Establish That Its Proposed Subzone Would Result in a Significant Public Benefit

As explained above, the public benefits that REC Silicon claims that its subzone would generate are (1) the maintenance and possible expansion of its operations in the United States[92] and (2) "increased employment (or at the very least, retained employment)" at its Moses Lake facility.[93] REC Silicon claims that these benefits would result from increased cost

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[87] *REC ASA – Secures NOK 5 Billion in Silane Sales Contracts*, *available at* http://www.recsilicon.com/default.asp?V_ITEM_ID=611&xml=/R/136555/PR/200807/1236880.xml (last visited October 14, 2009).

[88] PV Investors Conference Presentation at 6; NEREC Investors Seminar Presentation at 9.

[89] *Id.*

[90] Renewable Energy Corporation ASA, Annual Report 2008, at 8, *available at* http://hugin.info/136555/R/1307727/301168.pdf (last visited October 14, 2009).

[91] *Id.* at 10. *See also*, *id.* at 49 ("solar grade polysilicon is primarily sold internally to REC Wafer on long-term contracts based on arms-length terms, conditions and market expectations that existed at the time terms were fixed").

[92] REC Silicon Application at 3, 4.

[93] *Id.* at 1-2. *See also id.* at 2-3.

competitiveness, which the company is "hopeful" would generate more sales, which in turn would create a need for more employees at Moses Lake.[94] The only cost savings identified as the source of increased cost competitiveness is the elimination of duties on silicon metal imports (an estimated savings of $1 to $2 million in 2009 and $2 to $3 million in 2010).[95] REC Silicon also argues that a subzone would enable it obtain enough silicon metal for its operations, which it says is in short supply.[96]

These representations fail to establish that the proposed subzone would result in a significant public benefit. First of all, as explained above, there is no shortage of silicon metal. With respect to cost competitiveness, REC Silicon is an extremely profitable company with a strong market position. In addition, not only is REC Silicon already highly cost competitive, its own published reports indicate that approximately 70 percent of its sales are made to REC Wafer and more than 90 percent of its revenues through 2013 are locked in under long-term contracts. Moreover, the annual cost savings that REC Silicon claims would be realized by operating in a subzone are insignificant in relation to the value of the company's sales. REC Silicon's revenues in the first half of 2009 were $292 million, which is equivalent to $584 million on an annualized basis. At the $1 million level, REC Silicon's estimated FTZ savings represent a fraction of one percent (0.02 percent) of the company's annualized 2009 revenues. Even at the $3 million level, the projected zone savings represent only 0.05 percent of its annualized 2009 revenues. In these circumstances, there is no basis for the claim that these small cost savings might determine whether the company is able to maintain or expand its U.S. operations.

Similarly, with respect to employment, there is no credible basis for the claim that these cost savings might stimulate higher sales sufficient to result in increased employment. The cost savings are too small to have a material impact on REC Silicon's sales volume. Moreover, because most of REC Silicon's sales are to REC Wafer and the vast majority of the sales are under long-term contracts with fixed prices, lower costs would simply generate increased profits. Furthermore, regarding the Moses Lake expansion projects, REC Silicon stated that Plant 3 "will not result in an increase in employment since all employees have already been hired" and that as to Plant 4, "it is anticipated that an additional 30 to 35 employees will be added" in early 2010.[97]

There is no indication that any of these additional jobs are in any way dependent on approval of the subzone. In fact, REC Silicon made the decision and provided funding for the plant expansions years before submitting its subzone application. In addition, with respect to the increased capacity coming on line in 2009, the REC Group annual report states that REC Silicon already has contracts in place for delivery of the additional material.[98] Furthermore, according to investor presentations made as recently as this month, while these capacity expansions are being completed and put into operation, REC Silicon is expected to have a long-term contract backlog through 2014.

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[94] *Id.* at 2-3.

[95] *Id.* at 10.

[96] *Id.* at 2.

[97] *Id.*

[98] Renewable Energy Corporation ASA, Annual Report 2008, at 16-17.

Finally, under its regulations, the Board is required to take into account the impact that approving a subzone application would have on related domestic industry, including the value of the domestic silicon metal sales that would be lost by Globe to imports sold at dumped prices. The detriment to Globe (and its employees) of such sales losses would be far greater than any benefit to REC Silicon in the form of increased profitability.

In sum, the benefit that would result from approving the REC Silicon application would be to make an already highly profitable company with an assured volume of sales even more profitable. Such result does not constitute the significant public benefit required by the Board's regulations.

IV. Dow Corning Has Failed To Establish That Its Proposed Subzone Would Result in a Significant Public Benefit

As stated above, applicants for subzones have the burden of submitting evidence establishing that their proposed activity would result in a significant public benefit.[99] In its application and hearing presentations, Dow Corning has failed to submit evidence meeting this requirement.

A. Dow Corning's Access to More Than Adequate Supplies of Silicon Metal

In its application, Dow Corning claims that a lack of domestic silicon metal supply has led to shortages at its Kentucky facilities[100] and that historically, silicon metal supply has been a source of concern and vulnerability.[101] The application also states that Dow Corning needs subzone authority to expand the total supply of silicon metal to its U.S. operations and to provide more reliable supply to its Kentucky operations.[102]

In reality, Dow Corning obtains a large portion of its total U.S. silicon metal requirements from its own wholly-owned, captive suppliers – Brazilian producer Companhia Brasileira Carbureto de Calcio ("CBCC") and domestic producer Simcala, Inc. ("Simcala"). CRU publishes annual estimates of the volumes of chemical-grade silicon metal that silicon metal producers supply to major consumers (including Dow Corning). CRU estimates that Dow Corning consumed 134,000 MT of chemical-grade silicon metal in its U.S. operations in 2008 and that Dow Corning's own subsidiaries supplied 73,000 MT – more than half of the total amount consumed.[103] CRU estimates that Globe supplied a large portion (33,000 MT) of Dow

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[99] 15 C.F.R. § 400.31(c)(3).

[100] As Globe explained at the public hearing, Dow Corning's shortage claims relate to a one-time event two years ago when Globe's access to hydropower was unexpectedly reduced due to historically low water levels. To prevent that event from recurring, Globe contracted to purchase back-up grid power and spent $4 million to make the necessary furnace modifications. These steps were successful. Such an event never happened again.

[101] Dow Corning Application at 46.

[102] *Id.* at 47.

[103] CRU International, Suppliers & Consumers of Chemical Grade Silicon Metal 2008.

Corning's remaining 2008 requirements. According to CRU, Dow Corning's captive producers and Globe together supplied approximately 84 percent of Dow Corning's total U.S. silicon metal requirements in 2008.[104]

Globe alone has far more than enough unused capacity to supply the additional silicon metal that Dow Corning needs in the United States beyond the silicon metal that it obtains from its captive suppliers. Globe has more than 75,000 MT per year of available silicon metal production capacity. In addition, there are very large amounts of unused capacity in other countries that are not subject to antidumping duty orders As stated above, the most recent CRU silicon metal industry study shows that nearly 341,000 MT of unused capacity is available.[105] For example, CRU reports that France, Germany, and Spain have a combined 112,000 MT of unused capacity, Brazil has 112,000 MT of unused capacity, and Norway has 75,000 MT of unused capacity.[106]

One of the companies that is reported to have idle capacity is Dow Corning's own Brazilian subsidiary, CBCC.[107] Other companies with idle capacity include Becancour Silicon in Canada and Silicon Smelters in South Africa, two suppliers from which Dow Corning purchased silicon metal in 2008 and 2009. According to CRU, Becancour Silicon has 23,000 MT of unused capacity and Silicon Smelters has 19,000 MT of unused capacity.[108]

Thus, Dow Corning is not really concerned about supply. Instead, its objective is to purchase silicon metal sold at below-cost dumped prices.

B. Dow Corning's Claims Regarding Loss of Global Market Share

Dow Corning claims that it has lost significant global market share and that this market share loss is the result of its inability to compete in the United States and in export markets with foreign silicones producers that can obtain low-cost Chinese silicon metal without paying antidumping duties.

Dow Corning has neither adequately explained nor supported its claim regarding the amount of market share it has lost, nor has Dow Corning disclosed the facts needed to evaluate its assertion that the loss of market share is due to its inability to obtain dumped Chinese silicon metal without paying antidumping duties.

Regarding the amount of market share lost, a Dow Corning representative stated at the hearing that "Dow Corning's corporate global silicones market share" has fallen by 17

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[104] *Id.*

[105] CRU International, Silicon Market and Industry Analysis at 35, 38 (September 2009).

[106] *Id.*

[107] *Id.*

[108] *Id.* at 35, 37, 39-40.

percent between 2002 and 2007.[109] The Board needs to know what this statement means. In particular, the Board needs to know (1) whether only shipments from Dow Corning's Kentucky operations are included in the calculation of the loss of "corporate" global market share and (2) whether only products of the kind produced in Kentucky are included in the global consumption used in calculating the market share. In addition, the Board needs to know what happened to Dow Corning's market share in 2008 and year-to-date 2009.

With regard to why market share was lost, Dow Corning has not provided data showing the trends over time in its market share or the factors affecting its market share.

Furthermore, Dow Corning has not disclosed whether it has increased its Kentucky silicones production, sales, domestic shipments, and possibly even export shipments, but has lost global market share for one or more of the following (or other) reasons: global consumption of the products produced in Kentucky has grown faster than the capacity of the Kentucky facilities has grown, with the result that Dow Corning's domestic and export shipments constitute a smaller share of a larger total; Dow Corning's competitors have built new production capacity or expanded existing capacity in the United States; silicones producers (including Dow Corning itself) have built new capacity and expanded existing capacity to produce these products outside of the United States; and such foreign capacity is located closer to and can more effectively supply customers in foreign countries.

The Board should ask Dow Corning to provide the information necessary to evaluate whether Dow Corning's claim that it has lost market share due to its inability to obtain dumped Chinese silicon metal without paying antidumping duties is factually accurate. Specifically, the Board should require Dow Corning (1) to explain how it calculated the 17 percent figure, including the sources of the data used and what shipments were included in the numerator and denominator of the market share calculations and (2) to provide its market share for 2008 and year-to date 2009. In addition, the Board should require Dow Corning to provide all of the other information needed to evaluate its claim, including information regarding the trends in factors affecting Dow Corning's market share over the period from 2002 through 2009, such as (1) its annual production, sales, domestic shipments, and export shipments from the Kentucky facilities, (2) its annual production and shipments of such products from its foreign facilities, (3) its competitors' annual production and shipments of such products from their U.S. and foreign facilities, and (4) global consumption of such products.

C. Dow Corning's Claims Regarding Generating Public Benefits

The Dow Corning application claims that the Kentucky operations will become more competitive if Dow Corning is allowed to escape paying antidumping duties on dumped silicon metal and lists an array of pubic benefits that it claims will result from this increased competitiveness. These claimed benefits include: (1) the retention and possible growth of U.S. manufacturing operations, (2) increased exports, (3) continued support of research and development, and (4) various derivative benefits, such as spin-off employment, use of regional

[109] Tr. at 19 (Mr. Hansen).

suppliers and service providers, additional spending by area individuals and businesses, and attraction of industry to surrounding areas.[110]

The application provides no specific explanation of how avoiding payment of antidumping duties would generate these benefits, nor does it provide "probative and substantial evidence" demonstrating the claimed benefits would in fact be realized. Critical facts regarding the premises underlying this claim are not provided.

For example, the application states that the Carrollton, Kentucky site is a key supplier of "intermediate (basic) silicone materials" to other Dow Corning processing facilities.[111] However, the application does not disclose what percentage of the Kentucky exports consists of shipments of intermediates to other Dow Corning facilities.

Dow Corning has extensive foreign operations. These foreign operations include 29 manufacturing sites for silicones: nine in the United States; one in Brazil; one each in Belgium, Germany, France, and Italy; two in the United Kingdom; two in India, four in Japan; one in Korea; one in Thailand; one in Taiwan; and four in China.[112] The plants at Carrolton and Elizabethtown, Kentucky; Midland, Michigan; Barry, Wales; and Zhangjiagang, China are integrated plants where the production process begins with silicon metal and moves through the chlorosilane and siloxane stages to the polymer stage.[113]

The plant in Zhangjiagang is the largest facility in China producing siloxane (basic/intermediate silicone materials).[114] The site consists of a Dow Corning siloxanes plant, Dow Corning silicones finishing plants, and a fumed silica plant that is being operated together with Dow Corning's joint venture partner, Wacker Chemie AG.[115] The plant will serve customers in China and throughout Asia.[116]

Dow Corning has not explained how the requested subzone would affect its foreign operations.

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[110] Dow Corning Application at 12.

[111] *Id.* at 10.

[112] Dow Corning Application at 39-40.

[113] *Id.* at 38, 39, 40.

[114] *Dow Corning Opens Silicone Rubber Plant to Support Asia Growth, available at* http://www.dowcorning.com/content/news/Dow_Corning_Opens_Silicone_Rubber_Plant_to_support_Asia_growth.asp (last visited October 19, 2009).

[115] Dow Corning Locations, Asia, China, Zhangjiagang, *available at* http://www.dowcorning.com/content/about/aboutlocn/ (last visited October 19, 2009).

[116] *Id.* Construction of the project started in 2006, siloxane production began in April of 2008, and completion of the project is expected during 2010. *Id.*

At the hearing, the FTZ Board examiner, Elizabeth Whiteman, asked a number of important questions about Dow Corning's exports, but did not get adequate answers to her questions. Specifically, Ms. Whiteman asked whether the exports were primarily intermediates. In response, she was told that the exports were "a combination of intermediates and finished products."[117] Ms. Whiteman then asked whether Dow Corning supplies silane/siloxane to any of its facilities abroad for use in producing finished products in those countries. In response, she was told that "some" of the silane/siloxane used to produce finished products in Dow Corning's foreign facilities comes from Carrollton and "some" comes from Dow Corning's overseas facilities.[118] Ms. Whiteman then asked what percentage of the silane/siloxane further processed in Dow Corning's overseas facilities is supplied by Carrollton. In response, she was told that the Dow Corning representative did not have those numbers with him.[119]

To evaluate Dow Corning's claims regarding the generation of public benefits, the Board needs answers to the questions asked at the hearing, but not answered.

The Dow Corning application also states that export sales from the Kentucky operations account for approximately 20 percent of the sales from all of Dow Corning's Kentucky facilities combined.[120] However, the application does not disclose whether all of the exports included in the 20 percent calculation are exports of products made in Kentucky using silicon metal as an input. These exports also may include finished products made from intermediates produced from silicon metal at other Dow Corning locations, such as its production facilities in Barry, Wales and Zhangjiagang, China.

To evaluate Dow Corning's claims, the Board needs to know how the twenty percent figure was calculated and whether (and if so) to what extent it includes exports of finished products made from intermediates produced from silicon metal at other Dow Corning locations.

D. Dow Corning's Claims That Globe Will Not Be Hurt If the Subzone Is Authorized

The Dow Corning application states that Dow Corning that "has no intention to reduce or cease purchases from Globe."[121] At the hearing, a Dow Corning representative said that "Globe will not be injured by Dow Corning's proposed use of foreign trade zone procedures" and that "Dow Corning does not intend to use and will not use silicon metal purchases subject to antidumping duties to reduce our historical levels of silicon purchases from Globe plants for the U.S. sales."[122]

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[117] Tr. at 148 (Mr. Searcy).

[118] *Id.*

[119] *Id.* at 149.

[120] Dow Corning Application at 10.

[121] *Id.* at 48.

[122] Tr. at 111, 114 (Mr. Searcy).

The application also states that the Dow Corning's Kentucky operations currently source 40 to 50 percent of their silicon metal requirements from domestic suppliers, and import as much as 60 percent, with none of the imports subject to antidumping duties.[123] The application further states that the share of domestic silicon metal will remain unchanged if the proposed subzone is approved, while among the imports, the share of silicon metal subject to antidumping duties could be as high as 50 percent[124] – which would constitute as much as 30 percent of the Kentucky operations' total requirements.

Dow Corning has not provided specific information regarding its silicon metal purchases. However, CRU publishes annual estimates of the volumes of chemical-grade silicon metal that producers supply to major consumers (including Dow Corning). According to CRU, in 2008 Dow Corning's two captive producers, Simcala and CBCC, supplied 73,000 MT of chemical-grade silicon metal to Dow Corning (54 percent of Dow Corning's total U.S. requirements).[125] From 2005 through 2007, the two captive producers supplied similar volumes, ranging from 69,000 MT to 72,000 MT. During that period, the share of Dow Corning's annual requirements supplied by the captive producers ranged from 60 to 63 percent and averaged 61 percent. Dow Corning has made large investments to acquire its own captive silicon metal supply. For this reason, it is unlikely that Dow Corning would reduce the volume of silicon metal obtained from its captive suppliers if the proposed subzone were authorized.

Adding silicon metal imports from China (or Russia) equivalent to a 30 percent share of Dow Corning's requirements to the 54 percent captive portion of Dow Corning's consumption in 2008 would leave a remaining share of 16 percent. On average, during the years 2005 through 2007, adding 30 percent to the 61 captive portion would leave a remaining share of nine percent.

By comparison, CRU estimates that Globe supplied 25 percent of Dow Corning's total U.S. requirements in 2008 and on average 22 percent of Dow Corning's U.S. requirements during 2005 through 2007.[126] These facts and Dow Corning's own statements regarding the percentage of its requirements that it might source from China or Russia contradict Dow Corning's claims that approval of its application would not result in a reduction of its silicon metal purchases from Globe.

E. Dow Corning's Commitment to Its U.S. Manufacturing Operations

In addition, Dow Corning – like REC Silicon – claims that it needs subzone authority to maintain its U.S.-based manufacturing operations.

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[123] Dow Corning Application at 45.

[124] *Id.* at 46.

[125] CRU International, Suppliers & Consumers of Chemical Grade Silicon Metal 2008.

[126] According to CRU, in 2008 Globe supplied 33,000 MT of chemical-grade silicon metal to Dow Corning. From 2005 through 2007, Globe's Alloy, West Virginia plant supplied volumes ranging from 22,000 MT to 29,000 MT. CRU International, Suppliers & Consumers of Chemical Grade Silicon Metal 2005-2008.

At the hearing, Dow Corning said that it is proud of its "ongoing commitment to invest in manufacturing in the United States," pointed to the fact that its Kentucky plants have been in operation since the mid-1960s, and explained that the Kentucky operations alone represent a $700 to $800 million investment, with a recently completed $60 capacity expansion. In 2006, when Dow Corning announced the $60 million investment in the Carrollton facility, Dow Corning's site manager stated that the company is looking forward to its next 40 years at the Carrollton location.

These facts and statements demonstrate Dow Corning's long-term commitment to its Kentucky operations independent of its subzone application. None of Dow Corning's investment decisions were made with the expectation that it would apply for and obtain subzone authority. Dow Corning has not provided any evidence showing that avoiding payment of antidumping duties is somehow an essential prerequisite for its continued investment in and successful operation of the Kentucky facilities.

F. Dow Corning's Statement Regarding "Prioritizing" the Use of Its Silicon Metal Supplies and Its Intentions Regarding Future Subzone Applications

Dow Corning is investing heavily in the solar silicon sector. In December 2008, it announced a $3 billion investment that includes expansion of the Hemlock Semiconductor facilities in Michigan and construction of new facilities in Tennessee.[127] These investments follow a $1 billion expansion at Hemlock announced in May 2007.[128] Dow also is investing "hundreds of millions" of dollars in a new monosilane production plant near the existing Hemlock facilities in Michigan.[129]

At the hearing, Dow Corning testified that there is a "need to prioritize silicon metal supplies for use in high value specialty product manufacturing such as our company's expanding solar processing business" in the United States.[130]

Dow Corning did not explain the meaning of this statement, nor has it disclosed whether it intends to apply for one or more additional manufacturing subzones for its **polysilicon** production facilities (as well as its silicones facilities outside of Kentucky). The Board needs to know what Dow Corning means in saying that it needs "to prioritize silicon metal supplies for use in high value specialty product manufacturing." In addition, to evaluate the trade policy implications of multiple applications designed to avoid paying antidumping duties on silicon metal imports, the Board needs to know whether Dow Corning intends to request additional

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[127] *Dow Corning Announces Multi-Billion Dollar Investments to Serve Emerging Global Solar Power Industry, available at* http://www.dowcorning.com/content/news/Solar_Investment_Dec08.asp (last visited October 21, 2009).

[128] *Id.*

[129] *Dow Corning Begins Construction at Solar Monosilanes Facility, Unveils New Solar Array and Education Center, available at* http://www.dowcorning.com/content/news/Dow_Corning_solar_news. aspx?bhcp=1# (last visited October 21, 2009).

[130] Tr. at 19 (Mr. Hansen).

subzones covering its polysilicon facilities (as well as its silicones facilities outside of Kentucky) in the future.

E. Dow Corning's Failure To Establish That Its Proposed Subzone Would Result in a Significant Public Benefit

For the reasons explained above, Dow Corning has failed to provide evidence demonstrating that its proposed subzone would do anything more than generate a private benefit for Dow Corning in the form of increased profitability. In these circumstances, the required basis for approval of the application does not exist.

V. Conclusion

As subzone applicants, Dow Corning and REC Silicon bear the burden of establishing that their proposed zone activities are in the public interest and would result in a significant public benefit.[131] For the reasons explained above, and in Globe's hearing request and hearing testimony, Dow Corning and REC Silicon have failed to make the required showing.

Furthermore, these applications are designed to avoid payment of antidumping duties and to undermine the antidumping orders protecting the domestic silicon metal industry from injurious dumped imports. For that reason, approving the requested subzones would be contrary to the public interest.

"Congress granted the Foreign-Trade Zones Board very broad regulatory authority over foreign-trade zones and subzones."[132] In this case, the Board should exercise that authority by determining that Dow Corning and REC Silicon have failed to meet their burden of establishing that their proposed zone activity would be in the public interest and would result in a significant public benefit.

Respectfully submitted,

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October 21, 2009

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[131] 15 C.F.R. §§ 400.25(b), 400.31(c)(3).

[132] *Citgo Petroleum Corp. v. The United States Foreign-Trade Zones Board*, 83 F.3d 397, 400 (Fed. Cir. 1996) (citation omitted).